IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 9TH OCTOBER 2007 / 17TH ASWINA 1929

AS.No. 307 of 1997()

OS.622/1991 of II ADDL.SUB COURT, KOZHIKODE

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APPELLANT/DEFENDANT:

CORPORATION OF CALICUT, REP. BY ITS SECRETARY,
NAGARAM AMSOM AND DESOM OF KOZHIKODE TALUK.

SRI.C.M.SURESH BABU,SC,KOZHIKODE CORPN.

RESPONDENT/PLAINTIFF:

VELUTHEDATH BINDU, MINOR AGED 17 YEARS, D/O.SADASIVAN,
REP. BY FATHER AND NEXT FRIEND, VELUTHEDATH SADASIVAN,
AGED 50 YEARS, NALLALAM AMSOM AND DESOM, KOZHIKODE TALUK.

BY ADV. SRI.M.P.KRISHNAN NAIR

THIS APPEAL SUITS HAVING COME UP FOR ADMISSION ON 09/10/2007,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR ,J.

A.S.No.307 of 1997

Dated, this the 9th day of October, 2007

JUDGMENT

The Corporation of Kozhikode who is the defendant in O.S.No.622/1991 on the file of the II Additional Sub Court, Kozhikode is the appellant. Appeal is filed against a decree and judgment passed by the court below by which a decree was granted in favour of respondent allowing her to recover an amount of Rs.5,500/- as damages from the date of suit till the date of realisation.

2. The respondent filed the suit as an indigent person claiming damages against the appellant on the following averments. The respondent was residing in building belonging to one Apputty situated at Division No.45 of Panniyankara amsom and desom. She was studying in the first shift of 5th standard in Thiruvannur Government U.P.School. On 13.7.1990, at about 1.15 p.m. she was returning to her home from the School. When she reached near the steps leading to her house from the lane situated on the eastern side of her house a stray dog came barking and bit her. Thereafter it ran away. Hearing the hue and cry of the respondent the neighbours rushed to the spot and took her to Medical College Hospital at Kozhikode. Doctor advised the respondent to take antirabies injunction. At that time father of the first respondent was not in station. On account of dog bite the respondent suffered intense pain and she fell ill. She was unable to attend the classes. When she started attending the school her friends

neglected her which caused mental tension and fear in her mind. Her father had spent more than Rs.10,000/- for treatment and transportation to hospital for undergoing treatment. A statutory duty is cast upon the appellant to dispose of the stray dogs without owners. The appellant failed to discharge that duty and respondent sustained dog bite only because of the failure on the part of the appellant to discharge the statutory functions. So appellant is liable to pay compensation. There was increasing attacks by dogs having rabies. Malayala Manorama daily published news items every day to attract the attention of the appellant. But the appellant ignored those news items and hence the incident occurred. First antirabies injunction was administered on 14.7.1990 and the last injunction on 14.10.1990. Respondent was directed to take rest for 90 days after last vaccination of antirabies. Respondent who is the daughter of a labourer found it difficult to raise the necessary funds for undergoing treatment. The medicine administered to the respondent was very costly and her father had spent a lot of amount for securing the medicines and hence the appellant is liable to pay damages to the respondent. She claimed Rs.10,000/- as treatment expenses and Rs.15,000/- for the mental tension and strain she suffered on account of the neglect from her friends. She issued notice claiming a total compensation of Rs.25,000/-. The appellant issued a reply notice raising false and untenable contentions. Hence the suit for compensation.

3. Appellant filed a written statement raising the following contentions.

Suit was not maintainable. Suit was filed without any bonafides. The respondent was not residing in the house of Apputty. No incident as described in the plaint had taken place and there was no stray dogs wandering in that area. No complaint was received from anybody alleging that there was any stray dog wandering at that area or any person of that area had sustained dog bite. The respondent might have bitten by a dog at a place outside the Corporation limits. There was a special machinery to eliminate the stray dogs and that Office was working very efficiently. The possibility of respondent sustaining bite of a dog which was being termed as a domestic animal in a neighbouring house cannot be ruled out. The quantum of compensation claimed was denied.

4. Learned Sub Judge after appreciating the evidence found that the respondent was residing within the Corporation limits. It was held that the contention of the appellant that its machinery to destroy stray dogs is fool proof cannot be given much weight. It was further found that a statutory duty is cast upon the Corporation to eliminate all stray dogs and the appellant failed to discharge that duty. The respondent was found to be entitled to get an amount of Rs.5,500/- as compensation. Challenging that decree and judgment this appeal is filed.

5. Learned counsel appearing for the appellant has argued that the court below failed to consider the issue arising for consideration in the suit. It is argued that the finding of the court below that a mandatory duty is cast upon the

Corporation to annihilate all stray dogs is not correct. It is argued that even accepting the contention of the respondent that such a duty is cast upon the appellant that alone is not a sufficient ground to award compensation. It is also argued that there was no specific finding that the respondent was bitten by a stray dog and such an incident happened on account of the negligence of the appellant. It is argued that the mere fact that there was a provision in the Municipality Act to dispose of the stray dogs does not mean that there was a statutory duty cast upon the appellant to depute its officers to cover the entire city every day. It is also argued that there was absolutely no pleading or proof to show that a stray dog was wandering in the area wherein the incident took place and any other person sustained dog bite. It is argued that even though a contention was raised in the plaint that several such cases were reported in the local dailies no paper reports were produced and no attempt was made by the plaintiff to prove that allegation.

6. Learned counsel appearing for the respondent has argued that a mandatory duty is cast upon the appellant to catch and kill all stray dogs. It is argued that there is total failure on the part of the Corporation to discharge the mandatory duty and that any person who sustains the dog bite inside the Corporation area is entitled to get damages.

7. The main point arising for consideration is whether the appellant is liable to pay compensation. In the plaint it was averred that the respondent was walking through a private lane leading to her house. It was further averred that

when she reached near the steps leading to her house a stray dog came there and bit her. Thereafter it ran away. It was further averred that on hearing the hue and cry the neighbours rushed to the spot and took the respondent to the Medical College Hospital, Kozhikode. In paragraph 4 of the plaint it was averred that the attack on people by wandering dogs suffering from rabies had become a frequent incident and number of news items appeared in Malayalam Dailies like Malayala Manorama.

8. It is true that the written statement filed in this case was throughly unsatisfactory. Respondent's father was examined as PW1. Admittedly PW1 was not in place at the time of incident. He was not an eye witness. PW2 was examined as an eye witness. During chief examination PW2 deposed that he had seen the incident. But during cross examination he deposed that he saw that the child running crying and he does not know whether anybody had killed the dog which bites the respondent. It is very pertinent to note that in the plaint it is very specifically stated that the neighbours rushed to the spot on hearing the hue and cry of the respondent. There is no averment in the plaint to the effect that the incident was witnessed by PW2 or by any other person. PW3 is the doctor who treated the respondent PW3 deposed that on 14.7.1990 he had examined the patient by name Bindu and she was administered antirabies vaccination from 17.7.1990 onwards. So I do not find any reason to disbelieve the case of the respondent that on 13.7.1990 she was bitten by a stray dog and she was taken to

Medical College Hospital, Kozhikode and treated there. She was administered antirabies vaccine. But that alone is not sufficient to award damages to the respondent. Learned Sub Judge found that a mandatory duty is cast upon the appellant Corporation to dispose of all stray dogs. Chapter XIX of the Kerala Municipality Act ('the Act' for short) which deals with 'Nuisances'. Section 411 of the Act deals with ' Precautions in case of dangerous structures' and Section 412 deals with 'Precautions in case of dangerous trees'. Section 437 deals with 'Licensing of dogs' and Section 438 deals with 'Power to dispose of stray pigs and dogs'. Section 437 reads as follows:

> "**437. Licensing of dogs.-** No person shall keep any dog except with a licence obtaining from the Secretary and every owner shall cause his dog to be inoculated against rabies."

Section 438 reads as follows:

> "**438.power to dispose of stray pigs and dogs.-** The Secretary may order for the seizure and destruction of unlicensed pigs or dogs straying in the municipal area shall make such arrangements therefor as he may deem fit."

9. Learned counsel appearing for the respondent has argued that a mandatory duty is cast upon the Corporation to issue licence to the owners of domestic dogs and the Section enjoins that all the dogs must be inoculated against rabies. It is argued that owners of every licensed dog shall ensure to use a color and any stray dog without color has to be caught and killed. It is to be noted

that respondent has no case that the dog was being brought up by anyone of the neighbouring persons. On the other hand the averment was to the effect that it came from somewhere, bite the respondent and vanished from the scene. There is no pleading or proof to the effect that that particular dog was seen by anybody before or after the incident at that place.

10. The learned Subordinate Judge relying on the decision reported in Sri Rangaswami, the Textile Commissioner and others v. The Sagar Textile Mills (P) Ltd. And others (AIR 1977 SC 1516) found that though the word used in Section 438 is 'may' it must be given a meaning of 'must' or 'shall' and it must be taken as a mandatory duty. The principle laid down in that decision can have no application to the facts of this case. In this case the appellant has no case that it has no duty at all. In the reply notice as well as in the written statement it was contended that the appellant has got a system to dispose of all stray dogs and it was effectively functioning. The only question arising for consideration is whether the incident by which the respondent sustained dog bite can be termed as a tortious act or as an act in violation of the statutory duty. Learned counsel appearing for the appellant has argued that there is absolutely no material to show that there is any tortious liability on the part of the appellant. It is argued that to hold the public authority liable for such an omission there must be positive evidence. PW1 was residing with his family at Nallalam. PW1 had admitted that he had not seen the incident. PW1 had no case that any such incident took place on previous

occasions and anybody informed Corporation that that was an area wherein stray dogs were wandering. Though there was an averment in the plaint to the effect that news items appeared in the news papers, no paper reports were produced and proved in accordance with law. Even PW2 who claims to be an immediate neighbour had not stated that any such incident occurred prior to or after this incident. The incident occurred on 13.7.1990. PW2 was examined on 30.11.1995. So the evidence on record shows that it was an isolated incident. So the question arising for consideration is whether such an isolated incident is sufficient to hold that there was failure on the part of the appellant Corporation to discharge a statutory duty cast on it. In **Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum ((1997) 9 SCC 552)** the Apex Court has considered the matter. That was a case in which a person riding in the scooter died on account of falling of a tree which stood on the side of the road. The Apex Court held that proximity of relationship between the person who suffered damages and the wrongdoer, foreseeability of danger and duty of care owed by the authority must be established. It was further held that the Corporation cannot be excepted to have a duty to maintain constant supervision by testing the healthy condition of the trees and compensation can be awarded only on establishment of foreseeability of danger and also the proximity of relationship between the person who suffered damages and the wrongdoer. It was also held that the duty of care should not impose an intolerable burden on the authority and prevent it from performing its

normal duties. It was held as follows:

> "Negligence is failure to use such care as a reasonable, prudent and careful person would use, under similar circumstances. It is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances. Negligence also is an omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do. Negligence would include both acts and omissions involving unreasonable risk of having done harm to another. The breach of duty must cause damage. How much of the damage to be compensated by the defendant should be attributed to his wilful conduct and how much to his wilful negligence or careless conduct or remissness in performance of duty, are all relevant facts to be considered in a given act or omission in adjudging duty of care. The element of carelessness or the breach of duty and whether that duty is towards the plaintiff or the class of persons to which the plaintiff belongs are important components in tort of negligence. Negligence would, therefore, mean careless conduct in commission or omission of an act, whereby another to whom the plaintiff owed duty of care has suffered damage. The duty of care is crucial in understanding the nature and scope of tort of negligence."

It was also held that "the duty of care imposed on a local authority by law may not be put beyond what the statute expects of the local authority or Corporation to perform the duty." It was further held that "when the defendant was not in know of the discoverable defect or danger and it caused the damage by accident like

sudden fall of the tree, it would be difficult to visualise that the defendant had knowledge of the danger and he omitted to perform the duty of care to prevent its fault." It was also held that "in a situation like the present one where the victim being not aware of the disease/decay, the tree suddenly falls in a still weather condition, no one can anticipate and it is difficult to foresee that a tree would fall suddenly and thereby a person who would be passing by on the roadside, would suffer injury or would die in consequence and the Corporation or the authority is not liable to be sued for tort of negligence since the causation is too remote." It was also held that "the conditions in India have not developed to such an extent that a Corporation can keep constant vigil by testing the healthy condition of the trees in the public places, roadsides, highways, etc. It was further held that there is no duty to maintain regular supervision thereof.

11. It is true that under Section 438 of the Kerala Municipality Act a power is conferred on the Corporation to dispose of stray pigs and dogs. It is also true that Corporation is having officers to find out and dispose of stray dogs. But whether the Corporation can be held responsible for each and every action of dog bite within the Corporation area is the question arising for consideration. I am of the considered opinion that the answer must be in the negative. Though a duty is cast upon the officials it cannot foresee that such an incident will take place in a particular place. If there are materials to show that Corporation was

informed that in a particular area there is frequent attack of stray dogs and it fails to take effective action thereafter the Corporation cannot be allowed to contend that it is not responsible. But in this case there is no material to hold that the appellant was aware of the fact that there was stray dog wandering at that area. No documentary or oral evidence was adduced to hold that it was a place wherein stray dogs were found wandering.

12. Learned counsel appearing for the respondent relying on a decision reported in **Jacob Mathew v. Corporation of Cochin (1988 (2) KLT Case No.3, Page 2)** argued that a statutory duty is cast upon the Corporation under Section 211 of the Municipal Corporations Act. It was held that the Corporation has a statutory duty to keep the pavements in proper order and condition. A reading of the decision shows that that arose from an Original Petition filed by the petitioner for a direction to the Corporation to keep the pavements covered by the slabs. Further the decision itself will show that it was brought to the notice of the Corporation that there was an opening in the pavement. The stand taken by the Corporation is that they had installed a caution board and that board was removed by the antisocial elements. This Court held that placing a caution board is not sufficient and the Corporation has got a statutory duty to cover such drainage holes. So the facts of that case shows that in spite of the knowledge that such a danger was in existence there was failure to discharge the duty. So the facts of the

case can have no application to the facts of the present case. Learned counsel for the respondent also relied on a decision reported in **Municipal Commissioner v. David (1988 (1) KLT 675)** in which it was held that a suit claiming damages was maintainable. The facts of the case show that a coconut tree in the neighbouring property posed a distinct danger. It was about 80 feet long was indicative of its age and infirmity. It was leaning towards a building. This was brought to the notice of the Municipality but no action was taken for more than one year. The matter was again brought to the notice of the Municipality. The matter was placed before the council of the Municipality. Council took a decision to cut and remove that tree. But no further action was taken. Finally on 16.5.1980 the tree fell down causing damages to the building of the plaintiff. Plaintiff claimed damages. Municipality denied its liability. A learned Single Judge of this Court after considering the various aspects found that a statutory duty is cast upon the Municipality under Section 251 of the Municipalities Act, 1960. Section 412 of the Kerala Municipality Act deals with the provisions regarding precautions in case of dangerous trees. The facts of the case stated above show that more than one occasion the plaintiff had brought the dangerous condition of the coconut tree to notice of the Municipality. Though the Municipality was fully aware of the danger to which the plaintiff was exposed to, no action was taken. In such circumstances this Court found that plaintiff in that suit was entitled to get compensation. This Court held that if the local authority did not move its little

finger to avert the possible injury to persons and structures alike arising from a dangerous tree for such a long period as two years, they have necessarily to answer to the victims of their negligence. Learned counsel also relied on a decision reported in **Municipal Corporation of Delhi v. Sushila Devi (AIR 1999 SC 1929)**. Apex Court held as follows:

> "If there is a tree standing on the defendant's land which is dried or dead and for that reason may fall and the defect is one which is either known or should have been known to the defendant, then the defendant is liable for any injury caused by the fall of the tree."

The materials on record show that tree was a partly dried tree. The principle laid down in that case can have no application to the facts of this case.

13. The materials on record show that it was an unfortunate and isolated incident by which a 10 year old girl sustained dog bite caused by a stray dog which suddenly appeared from nowhere and thereafter vanished. It cannot be held that this particular incident took place on account of the failure on the part of the officers of the Corporation. Even if the Corporation takes all possible precautions to prevent the stray dogs in the Corporation area still animals from the neighbouring areas may stray in to Corporation area and cause such incident. Though the incident was very unfortunate, it is not possible to hold that there was any failure to discharge statutory duty cast upon the Corporation. Learned Subordinate Judge did not consider any of these aspects. Only on account of the

fact that such an incident took place within the limits of the Corporation, he directed the appellant to pay compensation. That decree is unsustainable and liable to be set aside.

In the result, appeal is allowed. The decree and judgment passed by the court below are hereby set aside. Suit is dismissed. A reading of the records show that the respondent is a daughter of a worker in middle class and she had no means to pay the court fee and she prosecuted the suit as an indigent person. I have already stated it was an unfortunate and unforeseeable incident in which a poor child sustained dog bite and she had suffered severe pain. She was administered antirabies vaccine which created mental tension and fear in her mind. So it is only just and proper that the Government refrain from taking action to collect the court fee due on the plaint as well as appeal from the plaintiff in this case. So there will be a direction to the Government not to recover the court fee due on the plaint or in the Appeal Memorandum.

K. PADMANABHAN NAIR,
JUDGE.

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K.PADMANABHAN NAIR, J.

A.S.No.307 of 1997

JUDGMENT

9th October, 2007.